

学校编码: 10384

分类号_____密级_____

学号: B200308016

UDC _____

廈門大學

博 士 学 位 论 文

兩岸經貿仲裁之合作機制研究

A Study on the Cross-Strait Cooperation in Economic and
Trade Arbitration Mechanisms

廖湖中

指导教师姓名: 曾 华 群 教 授

专 业 名 称: 国 际 法 学

论文提交日期: 2012 年 5 月

论文答辩时间: 2012 年 月

学位授予日期: 2012 年 月

答辩委员会主席: _____

评 阅 人: _____

2012 年 月

厦门大学学位论文原创性声明

本人呈交的学位论文是本人在导师指导下,独立完成的研究成果。本人在论文写作中参考其他个人或集体已经发表的研究成果,均在文中以适当方式明确标明,并符合法律规范和《厦门大学研究生学术活动规范(试行)》。

另外,该学位论文为()课题(组)的研究成果,获得()课题(组)经费或实验室的资助,在()实验室完成。(请在以上括号内填写课题或课题组负责人或实验室名称,未有此项声明内容的,可以不作特别声明。)

声明人(签名):

年 月 日

厦门大学学位论文著作权使用声明

本人同意厦门大学根据《中华人民共和国学位条例暂行实施办法》等规定保留和使用此学位论文，并向主管部门或其指定机构送交学位论文（包括纸质版和电子版），允许学位论文进入厦门大学图书馆及其数据库被查阅、借阅。本人同意厦门大学将学位论文加入全国博士、硕士学位论文共建单位数据库进行检索，将学位论文的标题和摘要汇编出版，采用影印、缩印或者其它方式合理复制学位论文。

本学位论文属于：

（ ） 1. 经厦门大学保密委员会审查核定的保密学位论文，
于 年 月 日解密，解密后适用上述授权。

（ ） 2. 不保密，适用上述授权。

（请在以上相应括号内打“√”或填上相应内容。保密学位论文应是已经厦门大学保密委员会审定过的学位论文，未经厦门大学保密委员会审定的学位论文均为公开学位论文。此声明栏不填写的，默认为公开学位论文，均适用上述授权。）

声明人（签名）：

年 月 日

內 容 摘 要

兩岸分裂 60 年後，台灣地區與大陸地區法域在法律體系和法律內容上存在很大差別，隨著兩岸交流日益增多，法律衝突之發生及增加無可避免。仲裁制度之民間性質，實在是日前解決海峽兩岸人民往來經貿紛爭之最佳選擇。本文研究有關兩岸經貿仲裁合作機制，除兩岸經貿糾紛及仲裁之現狀、兩岸經貿仲裁之主要問題、兩岸經貿仲裁判斷（裁決）相互認可與執行、兩岸經貿仲裁合作外；並論及區際法律衝突、仲裁法律性質之理論、值得參考之國際上重要仲裁公約、兩岸制度及國際間仲裁公約之比較、當事人意思自主原則、平等互惠原則、及衡平仲裁等重要內容。

2009 年 4 月 26 日台灣地區財團法人海峽交流基金會與大陸地區海峽兩岸關係協會（下稱兩會）就兩岸司法互助與聯繫事宜，經平等協商，達成協議雙方同意基於互惠原則，於不違反公共秩序或善良風俗之情況下，認可及執行民事裁判與仲裁判斷（仲裁裁決）；至此，兩岸從默示之平等互惠進而發展至明示之平等互惠，使兩岸經貿仲裁合作機制上確立有效之進展。

本文認為為盡量避免相同之經貿糾紛事件，如在兩岸各該仲裁機構之仲裁判斷（裁決）下有歧異之結果，影響當事人間之公平正義，兩岸經貿仲裁合作機制有其重要性。兩岸仲裁之合作，可從互納仲裁人做起，兩岸開啟政治協商之前，在兩岸既有基礎下，本文建議透過兩岸相關主管機關授權，循序漸進，經由兩會協定“兩岸聯合仲裁規則”、在兩岸分別設立專門處理兩岸經貿糾紛仲裁機構、次由兩岸處理經貿糾紛之仲裁機構聯合設立專門之仲裁機構、再次成立「兩岸常設仲裁法庭」等，才能克竟其功，確立兩岸經貿仲裁合作機制。以仲裁之民間性質，兩岸互設「準官方機構」都能成立，上揭建議協定應有實現之可能性。兩岸仲裁機構之交流，固然密切，並已取得相當程度之成果，但缺乏兩岸相關主管機關授權，易流於本位立場，治絲愈棼，淪為空談，而徒勞無功。

關鍵詞：兩岸經貿仲裁：區際法律衝突：當事人意思自主原則

ABSTRACT

Twain and Mainland China separated 60 years later, both of law districts across the Taiwan Strait have great differences in legal system and content. Due to the increase of Cross-Strait exchange, the occurrence and increase of legal conflict cannot be avoided. The folk nature of arbitration system is the best choice in solving the economic and trade dispute owing to Cross-Strait people's intercourse at present. This study researches the cooperation mechanism of economic and trade arbitration between Twain and Mainland China. Besides the present situation of Cross-Strait economic and trade dispute and the arbitration, the major problems of Cross-Strait economic and trade arbitration, the recognition and enforcement of the Cross-Strait economic and trade arbitration judgment (award), the cooperation of Cross-Strait economic and trade arbitration, also discusses the interregional conflicts of Laws, the theory of arbitration law quality, the Worthy reference of international arbitration convention, the comparison of Cross-Strait system and international arbitration convention, the independent principle of Litigant Meaning, the principle of equality and reciprocity and the equitable arbitration.

Taiwan's Straits Exchange Foundation and China's Association for Relations across the Taiwan Straits have reached the agreement about Cross-Strait judicial cooperation and contact matters after consultation on the basis of equality on April 26, 2006. Both associations have agreed to approve and carried out the civil referee and arbitral judgment (award) on the basis of reciprocal principle and not violating public order or good custom. Hence, from showing equality and reciprocity silently to clear instructions, Cross-Strait would establish the effective progress in Cross-Strait cooperation mechanism.

To avoid the same economic and trade dispute event as far as possible, this study considers that Cross-Strait economic and trade arbitration cooperation mechanism has its importance such as different results on arbitration judgment (award) of Cross-Strait arbitration organization and affected litigants' fair justice. Cross-Strait arbitration cooperation can start from accepting arbitrator mutually. Before opening the political consultation, this study suggests to

proceed in an orderly way through authorized Cross-Strait relative controlling organization. Both associations agree the “Cross-Strait combined arbitration rules” to set up the special arbitration organization jointly to deal with Cross-Strait economic and trade dispute and then to form the “Cross-Strait permanent arbitration court” in order to establish the Cross-Strait economic and trade arbitration cooperation organization firmly. Cross-Strait “quasi-authoritative institution” would be set up successfully through the folk character of arbitration. The suggestion agreement above will be accomplished possibly. Cross-Strait arbitration organization exchange is very closely and has obtained quite a few of achievements, but it lacks the authorization of relative Controlling organization. Therefore, it would tend to egoistic standpoint and empty talk and lead to a futile effort.

Keywords: Cross-Strait Economic and Trade Arbitration; Interregional Conflicts of Laws; Independent Principle of Litigant Meaning

目 录

緒 論	1
一、研究緣起.....	1
二、研究目的.....	1
三、研究範圍.....	3
四、研究說明.....	3
第一章 兩岸經貿糾紛及仲裁之現狀	5
第一節 仲裁為兩岸經貿糾紛解決途徑之選項	6
一、兩岸經貿糾紛亟需仲裁解決.....	6
二、仲裁之優點.....	8
三、仲裁適合為兩岸經貿糾紛解決途徑.....	9
四、仲裁解決兩岸經貿糾紛已獲致兩岸之協議.....	12
第二節 兩岸經貿仲裁涉及兩岸區際法律衝突問題	17
一、區際法律衝突.....	17
二、台灣地區與大陸地區區際法律衝突之解決.....	18
本章小結	26
第二章 兩岸經貿仲裁之主要問題	28
第一節 值得參考之國際上重要仲裁公約	29
第二節 仲裁協議之訂定	35
一、台灣地區.....	36
二、大陸地區.....	38
三、兩岸制度及國際間仲裁公約之比較.....	40
第三節 仲裁庭之組成	43
一、台灣地區.....	43
二、大陸地區.....	44
三、兩岸制度及國際間仲裁公約之比較.....	46

第四節 準據法之適用	48
一、台灣地區.....	50
二、大陸地區.....	52
三、兩岸制度及國際間仲裁公約之比較.....	54
第五節 仲裁之判斷（裁決）	56
一、台灣地區.....	56
二、大陸地區.....	59
三、兩岸制度及國際間仲裁公約之比較.....	61
本章小結	63
第三章 兩岸經貿仲裁判斷（裁決）之認可與執行.....	65
第一節 兩岸仲裁判斷（裁決）之認可	66
一、台灣地區.....	66
二、大陸地區.....	71
三、兩岸相互認可仲裁判斷（裁決）之情況.....	75
四、仲裁之和解與調解之情況.....	78
第二節 兩岸仲裁判斷（裁決）之執行	82
一、台灣地區.....	82
二、大陸地區.....	84
第三節 平等互惠原則	89
一、台灣地區.....	90
二、大陸地區.....	92
第四節 案例評析	94
一、大陸地區仲裁裁決在台灣地區認可執行之實例.....	94
二、台灣地區仲裁判斷在大陸地區認可執行之實例.....	100
本章小結	103
第四章 兩岸經貿仲裁合作	106
第一節 兩岸協議聯合仲裁規則之可行性	107
第二節 兩岸聯合仲裁機構之可行性	108

一、在台灣地區與大陸地區分別設立專門處理兩岸經貿糾紛仲裁機構....	108
二、由兩岸之仲裁機構聯合設立專門之仲裁機構.....	112
三、設立兩岸常設仲裁法庭.....	113
本章小結	114
結 論.....	116
一、研究發現.....	116
二、研究建議.....	118
附 錄.....	121
參考文獻	127

CONTENTS

Preamble	1
Section 1 Motive of Research	1
Section 2 Purpose of Research.....	1
Section 3 Scope of Research.....	3
Section 4 Limitation of Research.....	3
Chapter 1 The Present Situation of Cross-Strait Economic and Trade Dispute and the Arbitration	5
Subchapter 1 The Occurrence of Cross-Strait Economic and Trade and the Arbitration	6
Section 1 The Dispute of Economic and Trade across the Taiwan Strait.....	6
Section 2 The Advantage of Arbitration	8
Section 3 The Arbitration Suiting for Cross-Strait Economic and Trade Dispute Resolution Approaches	9
Section 4 The Arbitration Solving Cross-Strait Economic and Trade Dispute to Obtain Cross-Strait Agreement.....	12
Subchapter 2 Cross-Strait Economic and Trade Arbitration Involving Cross-Strait Interregional Law	17
Section 1 Interregional Conflicts of Laws	17
Section 2 The Solution of Interregional Conflict Laws between Taiwan and Mainland China.....	18
Chapter Conclusion	26

Chapter 2	The Major Problems of Cross-Strait Economic and Trade Arbitration	28
Subchapter 1	The Worthy Reference of International Arbitration Convention	29
Subchapter 2	The Scheduling of Arbitral Agreement.....	35
Section 1	The Part of Taiwan.....	36
Section 2	The Part of Mainland China.....	38
Section 3	The Comparison of Cross-Strait System and International Arbitration Convention.....	40
Subchapter 3	The Composition of Arbitration Court.....	43
Section 1	The Part of Taiwan.....	43
Section 2	The Part of Mainland China.....	44
Section 3	The Comparison of Cross-Strait System and International Arbitration Convention.....	46
Subchapter 4	The suitability of Applicable Law.....	48
Section 1	The Part of Taiwan.....	50
Section 2	The Part of Mainland China.....	52
Section 3	The Comparison of Cross-Strait System and International Arbitration Convention.....	54
Subchapter 5	The Judgment (Award) of Arbitration	56
Section 1	The Part of Taiwan.....	56
Section 2	The Part of Mainland China.....	59
Section 3	The Comparison of Cross-Strait System and International Arbitration Convention.....	61
Chapter Conclusion	63

Chapter 3	The Recognition and Enforcement of Cross-Strait Economic and Trade Arbitration Judgment (Award)	65
Subchapter 1	The Recognition of Cross-Strait Arbitration Judgment (Award)	66
Section 1	The Part of Taiwan.....	66
Section 2	The Part of Mainland China.....	71
Section 3	The Situation of the Mutual Recognition of the Cross-Strait Arbitration Judgment (Award).....	75
Section 4	The Situation of Reconciliation and Mediation on Arbitration	78
Subchapter 2	The Enforcement of Cross-Strait Arbitration Judgment (Award)	82
Section 1	The Part of Taiwan.....	82
Section 2	The Part of Mainland China.....	84
Subchapter 3	The Principle of Equality and Reciprocity	89
Section 1	The Part of Taiwan.....	90
Section 2	The Part of Mainland China.....	92
Subchapter 4	Case Analysis	94
Section 1	The Recognition and Enforcement of Mainland China's Arbitration Award Example in Taiwan	94
Section 2	The Recognition and Enforcement of Taiwan's Arbitration Judgment Example in Mainland China	100
Chapter Conclusion	103
Chapter 4	Cross-Strait Economic and Trade Arbitration Cooperation	106

Degree papers are in the "[Xiamen University Electronic Theses and Dissertations Database](#)". Full texts are available in the following ways:

1. If your library is a CALIS member libraries, please log on <http://etd.calis.edu.cn/> and submit requests online, or consult the interlibrary loan department in your library.
2. For users of non-CALIS member libraries, please mail to etd@xmu.edu.cn for delivery details.

厦门大学博硕士论文摘要库